UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
SOLID WASTE AND EMERGEN
RESPONSE

OSWER Directive **9355.7-03A**

MEMORANDUM

SUBJECT: Second Supplemental Five-Year Review Guidance

FROM: Stephen D. Luftig, Director
Office of Emergency and Remedial Response

TO: Director, Office of Site Remediation and Restoration
Region I
Director, Emergency and -Remedial **Response** Division
Region II
Director, Hazardous Waste Management Division
Regions III, XX
Director, Waste Management Division
Region IV
Director, Superfund Division
Regions V, VI, VII
Assistant Regional Administrator, Office of Ecosystems Protection and Remediatian
Region VIII
Director, Environmental Cleanup Office
Region X

PURPOSE

. Attached is the Second Supplemental Five-Year Review Guidance document. This second supplement implements OSWER'S response to an OIG audit of the Five-Year Review process. OSWER agreed to further clarify 1) what is meant by "on-going presence" at a site; 2) what is considered to be a "recent" site visit; and 3) items which need to be documented: (a) milestones **used to** implement recommendations contained in. five-year reviews, (b) who has responeibility to perform each recommendation and, (c) which agency has oversight authority.

ISSUES/CONCERNS

At this time, we face much uncertainty regarding our budget. Due to resource constraints we are limited in the activities that we can now perform. Therefore, it is important to consider ways in which we can leverage our resources to complete five-year reviews. For example, consider the possibility of re-directing available resources or using PRPs, as described in the guidance.

QUESTIONS

If you should have any questions regarding this guidance document, please contact Carol Bass of my staff at (703) 960-2788.

Attachment

cc: Barry Breen, OFFE
Chris Sebastian, Region 2 Five-Year Review Coordinator
Jennifer Wendell, Region 5 Five-Year Review Coordinator
Norval Schoenhals, Region 8 Five-Year Review Coordinator
Tina Lovingood, OIG

Attachment

OSWER Directive 9355.7-03A

SECOND SUPPLEMENTAL Five-Year Review Guidance

PURPOSE

This document has three purposes. The first is to supplement guidance to previous Environmental Protection Agency (EPA) directives on five-year reviews. The **second** is to encourage Regions to leverage resources by using potentially responsible parties (PRPs) to provide information for five-year reviews. The third is to remind Regions that five-year-reviews should include a signed EPA determination of whether a remedy remains protective of human health and the environment.

BACKGROUND

'NCP requirements Section 300.430(f)(4)(iii) of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part-300, (which implements section 121(c) of the. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 et seq.), requires five-year reviews "if a remedial action is selected that results in hazardous substances, pollutants, or contaminants remaining at the site above levels that allow for unlimited use and unrestricted exposure." Previous directives on the subject are Office of Solid Waste and Emergency Response (OSWER) Directives 9355.7-02 (May 23, 1991), "Structure and Components of Five-Year Reviews," and the first supplement to that guidance, OSWER' Directive 9355.7-02A (July 26, 1994). The 1991 and 1994 directives flesh out the purposes of five-year reviews.

This second supplement implements OSWER response to an audit of the five-year review process. The audit, "EPA's Management of Five-Year Reviews," Audit Report Number E1SFF4-11-0029-5100229, March 24, 1995, was conducted by the EPA Office of the Inspector General. The second supplement explains: (1) what is "ongoing presence!" at a site; (2) what is a "recent" site visit; and, (3) the need to document: (a) milestones used to implement recommendations contained in five-year reviews, (b) who has responsibility to perform each recommendation and, (c) which agency has oversight authority.1

1The policies set forth in this Directive are intended solely as guidance.. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials mav decide to follow the guidance provided in this Directive; or to act at variance with the Directive, *on* the basis of an analysis of specific circumstances. The **Agency** also reserves the right to change this Directive at any time without public notice.

Purposes of **five-year reviews.** The main purposes of five-year reviews are to determine whether: the remedy remains protective of human health and the environment; is functioning as designed; and, necessary operation and maintenance is being performed. Five-year reviews generally involve a site visit or documentation of conditions noted through ongoing presence at the site. Reviews should summarize recent technical data obtained from site monitoring, sampling or testing (if any), and *a..* rationale supporting any conclusions drawn from such data. The five-year review should include a signed determination by the EPA division director that the remedy is or is not protective of human health and the environment. It should also: prescribe measures necessary to correct any deficiencies; describe who i's responsible for implementation of measures to correct such deficiencies: note milestones of performance for such corrections; and, note who has oversight authority:

DISCUSSION

Types of review **necessary.** Sites where response is complete are generally 'subject to a Type I review. A Type II or Type III *review* should be employed only when site-specific circumstances indicate a need for a recalculation of the risk, or a new risk assessment, respectively. Sites where response is ongoing are generally subject to a Type Ia review. Type Ia sites typically require less intensive review.

Fewer tasks **for Type Ia** *reviews.* In establishing the Type Ia review, EPA distinguished between sites where response is ongoing, and where response is complete. Such distinction' recognized the obvious need for fewer steps in a five-year review when work is incomplete (e.g., ARARs review, or a special site visit). Sites generally qualify for a. Type Ia review until construction is completed and the site qualifies for listing on the **Construction** Completion List (CCL). Given that there are four levels of review and many site-specific circumstances, the tasks that are appropriate for any review will vary.

What tasks are appropriate? Prior guidance offers Regions options for five-year reviews, depending on the level of the review and site-specific circumstances. (See the Appendix to the 1991 directive.) A Region should only perform those tasks in five-year reviews that help it to determine whether the remedy *is* protective of human health and the environment, and should not mechanically perform tasks which do not help to reach that determination. Ongoing presence is an important factor in helping Regions to decide which tasks to perform during a five-year review.

"Ongoing presence" means that there is regular activity at the site evidenced by continuing response work. Such continuing response work may include a remedial action, a removal, studies

or investigations,. regular monitoring or sampling, or other regular activity at the site. When there is no ongoing presence at a site; a five-year review should include a "recent" site visit.

"Recent" **site visits.** For five-year review purposes, "recent" means **within 6 months** of initiation of the review, absent circumstances showing that older data will suffice to determine protectiveness. A remedial project manager (RPM) may combine a site visit for five-year review purposes with a visit conducted for some other purpose in which results of response are documented, for example, the latest annual site ***visit.*** RPMs **are** encouraged to leverage resources by using potentially responsible parties (PRPs) who have entered into settlement agreements.

Leveraging resources by using **PRPs.** Consistent with relevant settlement agreements, a lead agency may authorize PRPs to visit sites for five-year review purposes, and to conduct studies and investigations for EPA. Such studies and investigations may involve sampling, testing, monitoring, analysis, and recommendation of alternatives. The information or' recommendation9 may be very helpful to EPA in documenting whether the remedy remains protective.

Documenting results. The most important determination which should result from a five-year review is whether the remedy remains protective **of** human health and the. environment. Other findings necessary in a five-year review concern whether the remedy is functioning as designed, and whether necessary operation and maintenance is being performed. Those findings should be documented in the review, and should be the subject of recommendations, as appropriate. The determination of protectiveness should be documented in a signed statement by the Hazardous Waste Management Division Director at the foot of the five-year review. The determination should be that: (1) the remedy is protective; (2) it is not protective; -or, (3) it would be protective if certain measures-were taken.

Remedies that are not protective When a remedy is determined to be not protective, further documentation is required in a five-year review. That documentation 'should include both recommendations to ensure that ***a remedy*** becomes protective, and milestones toward achieving protectiveness, with clear timetables. The review should also make it clear who will **act.** In other words, the responsibility for performance of necessary measure9 should be clearly noted, if known. Finally, the review should document which agency has **oversight** responsibility to ensure that the necessary measures are completed.

QUESTIONS

If you should have any questions concerning this document, please contact Carol Bass of my staff at (703) 960-2788.